DEVELOPING ISSUES WITH SECTION 363 SALES

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The number of Section 363 sales of substantially all of the assets of debtors has increased in recent years leading some bankruptcy practitioners to refer to a bankruptcy case where substantially all of the debtor's assets are sold early in the case as a "Chapter 3" case. As with any Bankruptcy Code section as popular and complicated as Section 363, the number and type of issues that can arise are abundant. This paper addresses four distinct issues that arise in Section 363 sales. Beginning with the sale process, this paper addresses the fairness of the process with a focus on (i) equitable mootness of appeals of consummated 363 sales and (ii) the impact of 363 sales on junior lien holders. Next, this paper discusses issues related to conducting a 363 sale with a focus on credit-bidding issues. Third, this paper addresses an issue that occasionally arises at a sale hearing wherein a party attempts to interject a new bid after an auction has already been closed. Finally, this paper addresses a post-sale issue, namely successor liability claims.

I. FAIRNESS OF THE SALE PROCESS

The popularity of 363 sales stems in part from the amount of certainty intrinsic in the sale process based on the provisions of the Bankruptcy Code. Two attractive aspects of 363 sales are: (i) that consummation of a 363 sale generally renders an appeal of the order approving such sale moot, and (ii) that property may be sold free and clear of liens, claims, encumbrances and interests. As set forth herein, these tenets were called into question by the Ninth Circuit BAP in a recent decision; however, such decision may not have the far reaching consequences that were originally feared.[1]

A. Clear Channel

In 2008, the Ninth Circuit BAP decided the *Clear Channel* case. The issue presented to the court on appeal was framed as follows: "outside a plan of reorganization, does § 363(f) of the Bankruptcy Code permit a secured creditor to credit bid its debt and purchase estate property, taking title free and clear of valid, nonconsenting junior liens."[2] The court held that the sale was not free and clear of valid, nonconsenting junior liens.[3]

The debtor in *Clear Channel*, PW, LLC, owned certain real estate in Burbank, California and DB Burbank, LLC ("DB") held a claim in excess of $40 million secured by such property. DB acted as the stalking horse and a 363 sale was held where DB was the highest bidder, credit bidding the entire amount of its debt as consideration. The bankruptcy court entered an order authorizing the sale to DB of the real property free and clear of all liens, claims, encumbrances and interests. Clear Channel Outdoor, Inc. ("Clear Channel") was a junior lien creditor who held a claim of approximately $2.5 million. Clear Channel appealed the sale order and sought a stay of such order pending appeal which was denied by both the bankruptcy court and the Ninth Circuit BAP.

The first significant aspect of the *Clear Channel* decision related to mootness. As a general rule, an appeal of a sale order is mooted if the sale is consummated. However, the *Clear Channel* court found that an appeal of the bankruptcy court's order stripping the junior creditor's lien was not moot by virtue of the sale being consummated.[4]

In analyzing whether the consummation of the sale rendered the appeal moot, the court found that some aspects of the appeal were moot while others were not. More specifically, the court found that its review of the entire sale itself was rendered equitably moot due to consummation, but that the lien stripping issue was not rendered moot. The court determined that reversing the lien-stripping ruling did not implicate issues of negative impact on third parties commonly relied on by parties when arguing that the "egg" should not be unscrambled and the sale unwound. The court further found that reattaching the liens was not theoretically or practically difficult. It is important to note, however, that the court stated that DB had

[1] *Clear Channel Outdoor, Inc. v. Knupfer (In re PW, LLC)*, 391 B.R. 25 (9th Cir. BAP 2008).
[2] *Id.* at 29.
[3] *Id.*
[4] *Id.*

not identified any third party who would be prejudiced by reversal of the lien stripping ruling because it had relied on the sale order. If the highest bidder had been a disinterested third party, rather than a secured creditor credit bidding its debt, a more persuasive argument regarding harm could possibly have been made. This could be significant and parties should assess this and argue harm, if the facts support it, when trying to moot an appeal.

The second significant aspect of the decision was the court's finding that the property could not be sold free and clear of Clear Channel's junior lien. This is significant because the ability to obtain assets free and clear is one of the great advantages of purchasing assets through the bankruptcy process. Section 363(f) provides the statutory authority for selling assets free and clear of liens, claims, and encumbrances. That Section provides:

> The trustee may sell property under subsection (b) or (c) of this section free and clear of any interest in such property of an entity other than the estate, only if—
>
> (1) applicable nonbankruptcy law permits sale of such property free and clear of such interest;
> (2) such entity consents;
> (3) such interest is a lien and the price at which such property is to be sold is greater than the aggregate value of all liens on such property;
> (4) such interest is in bona fide dispute; or
> (5) such entity could be compelled, in a legal or equitable proceeding, to accept a money satisfaction of such interest.[5]

In *Clear Channel*, the court found that the only applicable Subsections of Section 363(f) were (3) and (5). With regard to Section 363(f)(3), the trustee argued that the phrase "aggregate value of all liens" means the "economic value of such liens, rather than their face value." The court found this proposed reading by the trustee to be too broad.

The crux of the appeal then centered on the applicability of Section 363(f)(5). Section 363(f)(5) provides that property may be sold free and clear of an entity's lien if "such entity could be compelled, in a legal or equitable proceeding, to accept a money satisfaction of such interest."[6] In analyzing such subsection, the court stated that the following three elements must be met: "(1) a proceeding exists or could be brought, in which (2) the nondebtor could be compelled to accept a money satisfaction or (3) its interest."[7] The court noted that neither the chapter 11 trustee nor DB had directed the court to any applicable proceeding under nonbankruptcy law and that the bankruptcy court made no finding on such account. As discussed herein, this finding by the court has been utilized as an out for courts that have been faced with a similar lien-stripping fact situation post-*Clear Channel*.

B. Case Law Post-Clear Channel

Surprisingly few cases have analyzed the *Clear Channel* case since its issuance. Two courts within the Ninth Circuit have issued opinions suggesting that courts are not interpreting *Clear Channel* as broadly as some may have feared. By way of example, the Bankruptcy Court for the Western District of Washington concluded that *Clear Channel* did not preclude a 363 sale free and clear for an amount less than the amount necessary to satisfy all liens.[8] The *Jolan* court noted that in *Clear Channel* the Ninth Circuit BAP did not address "non-contractual mechanisms whereby a lienholder might get less than full

[5] 11 U.S.C. § 363(f).
[6] 11 U.S.C. § 363(f)(5).
[7] *Clear Channel*, 391 B.R. at 41.
[8] *In re Jolan, Inc.*, 403 B.R. 866, 867 (Bankr. W.D.Wash. 2009).

payment yet lose the lien."[9] The court pointed out that the party defending the sale on appeal in *Clear Channel* failed to argue that there were any qualifying legal or equitable proceedings beyond cramdown under Section 1129 that could satisfy Section 363(f)(5) and that the Ninth Circuit BAP limited its ruling to the arguments raised by the parties on appeal.

The *Jolan* court further found that there are legal and equitable proceedings under Washington state law or federal law whereby a junior lienholder could be compelled to accept a money satisfaction thereby complying with Section 363(f)(5) including: (i) disposition of collateral by a senior secured party pursuant to the Washington Uniform Commercial Code; (ii) sale by a receiver; (iii) liquidation of a probate estate; (iv) personal property tax sale; (v) federal tax lien sale; and (iv) judicial and nonjudicial foreclosures. Accordingly, the *Jolan* court held that a sale could be made free and clear even if the proceeds from such sale are insufficient to pay all liens.

The United States Bankruptcy Court for the District of Alaska likewise found that a sale could be made free and clear of interests of junior lienholders due to Alaska state law allowing junior security interests to be eliminated at foreclosure sales and, therefore, that it was justified under Section 363(f)(1) and (5).[10] The *Jolan* and *Wrangell* courts' findings dovetail with the general rule that:

> [S]tate law typically permits a senior secured creditor to foreclose the secured interest of a junior secured creditor whether in a real estate foreclosure or under Article 9. Thus, whether in or out of a bankruptcy case, the junior secured creditor that is, in bankruptcy parlance "out of the money," should expect to receive nothing from the proceeds of the sale and, within a bankruptcy case, have a general unsecured deficiency claim instead.[11]

The courts in *Wrangell* and *Jolan* were not faced with the mootness argument addressed in *Clear Channel*. However, because those courts held that junior liens may be extinguished under state law foreclosure proceedings, this diminishes the likelihood for a successful appeal on the issue of lien stripping by a junior lienholder.[12] Therefore, the mootness issues raised by *Clear Channel* may not be that significant.

II. CREDIT BIDDING ISSUES UNDER A PLAN

Section 363(k) of the Bankruptcy Code provides, "at a sale under subsection (b) of this section of property that is subject to a lien that secures an allowed claim, unless the court for cause orders otherwise the holder of such claim may bid at such sale, and, if the holder of such claim purchases such property, such holder may offset such claim against the purchase price of such property."[13] In the simplest terms possible, a credit bid is little more that a setoff mechanism: essentially, the secured lender is given credit for its outstanding secured claim and only pays the net difference, if any, to the debtor.[14] Credit bidding also allows a secured creditor to prevent a debtor from selling its collateral too cheaply by effectively bidding its debt and taking title to the property.[15] Under Section 363, it is generally accepted absent some unusual circumstances, that secured lenders have the right to credit bid their debt at a 363 sale. However, such credit bid rights may be excluded if the sale is proposed under a plan.

A. Philadelphia Newspapers Case (3rd Circuit)

[9] *Id*.
[10] *Memorandum Re Sale*, Case No. 09-00012, Docket No. 116 (Bankr. D.Al. March 9, 2009).
[11] Oswald, F. & Winchell, A., *Missing the Forest for the Trees in § 363: How the Ninth Circuit's Bankruptcy Appellate Panel Neglected the Big Picture in the Clear Channel Decision*, 2009 No. 4 Norton Bankr. L. Advisor 2 (April 2009).
[12] Brighton, J. & Parrish, F., *Two Recent Decisions Show That § 363 Sales are not Dead in the Ninth Circuit*, 18-AUG Am. Bankr. Inst. J. 42, 43 (July/August 2009).
[13] 11 U.S.C. § 363(k).
[14] Norton J. of Bkrtcy. L. and Prac., Vol. 18 #16, p. 679.
[15] *Id*.

In a recent split decision, a 2-1 majority for the United States Court of Appeals for the Third Circuit ruled that a debtor's plan of reorganization that proposes a sale of assets free and clear of liens is not necessarily required to allow creditors whose loans are secured by those assets to credit bid at the sale. The majority decision in *In re Philadelphia Newspapers, LLC*,[16] which follows a similar decision from the United States Court of Appeals for the Fifth Circuit, *In re Pacific Lumber Co.*,[17] has important implications for the rights of secured creditors whose claims are being "crammed down" in a Chapter 11 plan of reorganization proposed in bankruptcy cases within the Third Circuit. However, a detailed dissent by Judge Thomas L. Ambro, a former bankruptcy attorney, may provide ammunition for *en banc* rehearing in the Third Circuit, and for secured creditors in other circuits to argue that they are entitled to credit bid their debt in any free and clear sale of assets proposed by a plan of reorganization, notwithstanding the debtor's desire to preclude credit bidding.

B. Pacific Lumber Case (5th Circuit)

In the *Pacific Lumber* matter, Palco, one of the debtors, owned and operated a sawmill, a power plant, and the town of Scotia, California. Scopac, another debtor, was wholly owned by Palco. Prior to the commencement of the case, Palco transferred ownership of 200,000 acres of timberland (the "Timberlands") to Scopac to facilitate the sale of $867.2 million in notes secured by the Timberlands and Scopac's other assets. The bankruptcy court confirmed the secured creditors' plan wherein the secured creditors paid the Noteholders cash in the amount of the value of the Noteholders' collateral. The indenture trustee for the Noteholders, whose competing plan had been denied confirmation, appealed and argued, among other things, that the secured creditors' plan was not "fair and equitable" because the confirmed plan sold the Noteholders' collateral without providing them the right to credit bid. At issue was Section 1129(b)(2), which dictates that, to be confirmed, a Chapter 11 plan must be fair and equitable. Section 1129(b)(2)(A) describes when a plan is "fair and equitable" as to secured claims; it provides:

> (A) With respect to a class of secured claims, the plan provides—
>
> (i) (I) that the holders of such claims retain the liens securing such claims, whether the property subject to such liens is retained by the debtor or transferred to another entity, to the extent of the allowed amount of such claims; and
>
> (II) that each holder of a claim of such class receive on account of such claim deferred cash payments totaling at least the allowed amount of such claim, of a value, as of the effective date of the plan, of at least the value of such holder's interest in the estate's interest in such property;
>
> (ii) for the sale, subject to section 363(k) of this title, of any property that is subject to the liens securing such claims, free and clear of such liens, with such liens to attach to the proceeds of such sale, and the treatment of such liens on proceeds under clause (i) or (iii) of this subparagraph; or
>
> (iii) for the realization by such holders of the indubitable equivalent of such claims.[18]

The Fifth Circuit in *Pacific Lumber* reasoned that because the plan proposed a sale, Subsection (ii) could apply and that the Noteholders had to prove Subsection (ii)'s *exclusive* applicability. The Noteholders argued that Subsection (ii) alone concerns the sale of collateral under a plan and specifically allows the dissenting creditor to credit bid for the collateral; therefore, as the more specific provision, Subsection (ii) should prevail over the more general indubitable equivalent standard set forth in Subsection (iii).

The Fifth Circuit rejected the Noteholders' interpretation of Subsections (ii) and (iii) and held that the

[16] *In re Philadelphia Newspapers, LLC*, Nos. 09-4266, 09-4349, 2010 WL 1006647 (3d Cir. Mar. 22, 2010).
[17] *See Bank of N.Y. Trust Co., NA v. Official Unsecured Creditors' Comm. (In re Pacific Lumber Co.)*, 584 F.3d 229 (5th Cir. 2009).
[18] 11 U.S.C. § 1129(b)(2)(A).

three Subsections of Section 1129(b)(2)(A) are joined by "or," and, therefore, are alternatives. The Court rejected the Noteholders' argument that Subsection (iii) would be rendered superfluous by this decision. The Court held that, although a credit bid option may render Subsection (ii) imperative in some cases, it was unnecessary here, because the plan offered a cash payment to the Noteholders. The Court held that Subsection (iii) affords a distinct basis for confirming a plan because it offered the Noteholders the realization of the indubitable equivalent of their claims. Because Subsections (ii) and (iii) explicitly protect repayment to the extent of the secured creditors' collateral value and the time value compensating for the risk and delay of repayment, "indubitable equivalent" is no less demanding of a standard than its companions. Whatever uncertainties exist about the indubitable equivalent, paying off secured creditors in cash can hardly be improper if the plan accurately reflected the value of the Noteholders' collateral.

C. Philadelphia Newspapers continued

A few months after the Fifth Circuit held that secured creditors do not have an absolute right to credit bid, the Third Circuit addressed the same issue and reached substantially the same conclusion. The debtors in the *Philadelphia Newspapers* cases owned and operated newspapers and online publications including the *Philadelphia Inquirer* and *Philadelphia Daily News*. Their Chapter 11 reorganization plan, proposed within the extended period of exclusivity during which no other party in interest could file a plan, called for a sale of substantially all of their assets, free and clear of liens, at a public auction. The "stalking horse" bidder was a group composed largely of current and former management and equity holders, thus explaining the desire to preclude credit bidding.

The secured lenders were owed approximately $318 million secured by first priority liens on substantially all of the debtors' real and personal property. The plan contemplated a "cramdown" of those secured claims, providing the lenders approximately $37 million in cash and title to the debtors' Philadelphia headquarters valued at $29.5 million (subject to a two-year rent-free lease in favor of the insider purchasers).

Cramdown is a statutory mechanism by which a reorganization plan can be confirmed over the objection of a class of dissenting creditors. Section 1129(b)(1) of the Bankruptcy Code requires a bankruptcy court to assess whether the proposed treatment of the dissenting class or classes is "fair and equitable." As described above, a plan which proposes to cram down secured claims is deemed to meet this requirement if it either (i) provides for the transfer of assets with the liens intact and deferred cash payments equal to the present value of the lender's secured interest in the collateral; (ii) provides for a sale of any property that is subject to liens free and clear of those liens, so long as the lender has the opportunity to credit bid and the liens attach to the proceeds of the sale; or (iii) provides for the realization by a secured lender of the "indubitable equivalent" of its claim. The debtors in *Philadelphia Newspapers* contended that their proposed "indubitable equivalent" of their claims while selling their collateral free and clear of the liens without affording the opportunity to credit bid under Subsection (ii).

In connection with the sale, the debtors filed a motion for approval of bid procedures that specifically precluded the lenders from credit bidding at the auction. In the bid procedures motion, the debtors argued that because the plan sale was to be conducted pursuant to a Chapter 11 plan under Section 1123(a)(5)(D) of the Bankruptcy Code, rather than Section 363(b), the lenders were not permitted to credit bid.[19] The lenders objected to the proposed bid procedures. The Bankruptcy Court for the Eastern District of Pennsylvania sustained the objection and ruled that the secured lenders must be permitted to credit bid their debt at any sale of their collateral free and clear of liens.

On appeal, the District Court reversed, holding that where a debtor seeks to cram down the claims of secured creditors by way of an asset sale under Section 1129(b)(2)(A)(iii) of the Bankruptcy Code (the

[19] 11 U.S.C. § 1123(a)(5)(D) provides that a Chapter 11 plan shall "provide adequate means for the plan's implementation, such as . . . (D) sale of all or any part of the property of the estate, either subject to or free of any lien, or the distribution of all or any part of the property of the estate among those having an interest in such property of the estate."

"indubitable equivalent" prong of the fair and equitable test), secured creditors have no right to credit bid at the sale.

The majority decision of the Third Circuit affirmed the District Court, based upon its "plain meaning" interpretation of the Bankruptcy Code. As a starting point in its analysis, the court noted that the plan sale provisions of Section 1123(a)(5)(D) contain no explicit procedures for the sale of estate assets. The court, therefore, looked to the plan confirmation provisions of Section 1129(b) to determine what requirements would be necessary to confirm a plan calling for a sale of the debtors' assets free and clear of liens.

The lenders made three principal arguments in support of their asserted right to credit bid at the sale. First, the lenders argued that the plain language of the Bankruptcy Code requires that all sales of assets free and clear of liens under a Chapter 11 plan be conducted under Section 1129(b)(2)(A)(ii), which expressly includes the right of secured creditors to credit bid. The court rejected this argument, holding that the use of the disjunctive "or" in 1129(b)(2)(A) operates to provide three distinct alternatives for cramming down a secured creditor, such that the debtors were permitted to proceed with a plan sale under any of Subsections (i), (ii), or (iii). Although Subsection (ii) specifically refers to a sale free and clear of liens and incorporates a right to credit bid under Section 363(k), the court found no statutory basis to conclude that Subsection (ii) is the only provision under which a debtor may propose to sell assets free and clear of liens under a plan.

Second, the lenders argued that the "indubitable equivalent" standard under Section 1129(b)(2)(A)(iii) is ambiguous, and that other portions of the Bankruptcy Code confirm the right of a secured lender to credit bid. The lenders further argued that because a credit bid sets the value of a secured lender's collateral, a sale of collateral without credit bidding can never provide the "indubitable equivalent" of a lender's secured interest. The court rejected these arguments and observed that other courts have concluded that a debtor can provide the indubitable equivalent of a secured lender's claim through other means such as cash payments or a substitution of collateral following an asset sale. The court noted further that even after the sale, the lenders would retain the opportunity to object to confirmation of the plan on the grounds that the treatment proposed for their claims did not meet the "indubitable equivalent" standard.

Third, the lenders argued that notwithstanding the plain language of 1129(b)(2)(A), denying the right to credit bid under Subsection (iii) would be inconsistent with the other provisions of the Bankruptcy Code. Specifically, the lenders argued that Section 363(k) and 1111(b) of the Bankruptcy Code together guarantee a secured lender one of two rights: either to credit bid or to elect to treat an undersecured claim as fully secured. Since recourse lenders are exempted from making the election under 1111(b), the lenders in *Philadelphia Newspapers* argued that they must be afforded the right to credit bid.

The court rejected this argument as well, noting that even under Section 363(k) the right to credit bid is not absolute but can be denied by a bankruptcy court "for cause." Ultimately, the court held that the Bankruptcy Code does not give secured lenders the right to recover value greater than their allowed secured claim, either by treating their unsecured claim as a secured deficiency claim under Section 1111(b) or making a credit bid under Section 363(k) in the hope of realizing any potential upside value after recovering their collateral.

In a dissenting opinion, Judge Ambro countered that as a matter of statutory construction any plan involving a sale of assets free and clear of liens and a cramdown of secured creditors must comply with the requirements of Section 1129(b)(2)(A)(ii), which incorporates the presumptive right of secured creditors to credit bid. In Judge Ambro's view, each Subsection of Section 1129(b)(2)(A) applies to an entirely different situation: Subsection (i) to transfers of assets, including sales, in which the assets remain to the liens; Subsection (ii) to sales free and clear of liens; and the "catch all" Subsection (iii) to other situations not covered by Subsections (i) and (ii). As further support for his position, Judge Ambro noted that Sections 363(k) and 1111(b) provide protection to secured creditors against under-valuations of their collateral, which protections cannot be eroded by resort to 1129(b)(2)(A)(iii). Simply stated, the

dissenting opinion would have held that where a debtor's plan contemplates a sale of assets free and clear of liens, the secured lenders holding those liens must be permitted to credit bid at the sale.

The effect of the *Philadelphia Newspapers* decision is to preclude a lender from asserting an inalienable right to credit bid when its collateral is proposed to be sold free and clear sale of liens under a Chapter 11 plan. The ruling, however, appears less than absolute in recognizing that "in some instances, credit bidding may be required," presumably to meet the overarching "fair and equitable" requirement under the cramdown statute. The majority also noted that a lender can still object to confirmation on a number of bases, including the notion that in the absence of credit bidding it cannot receive the "indubitable equivalent" of its collateral.

While rejecting the concept of an absolute right to credit bid, the decision does not preclude a secured lender from making a cash bid for its collateral, even where the proceeds of that bid would be used to repay its own loan. As noted in the dissenting opinion, the debtors in *Philadelphia Newspapers* were able to take advantage of coordination difficulties inherent in the administration of the large syndicated loan, which presumably impaired the ability of the multiple secured lenders write checks for a cash bid.

The applicability and the treatment of these decisions outside of the Third and Fifth Circuits remains to be seen. However, because of these rulings, lenders have even greater reason to seek protection of the credit bid right in financing and cash collateral orders. In many circumstances in this market, lenders may find themselves grossly undersecured as in *Philadelphia Newspapers*, and may argue from the outset of the case that they should not be required to fund a process that deprives them of the benefit of their bargained-for rights. As it stands, however, neither Circuit recognizes the absolute right of a secured lender to credit bid in a sale proposed under a plan of reorganization.

III. FAIRNESS AT THE SALE HEARING

A. The Sale-Hearing Spoiler

The typical process for selling assets under Section 363 in a Chapter 11 is comprised of two steps. First, the debtor will usually propose a set of procedures (i.e., "bid procedures") to govern marketing the assets, performance of due diligence by prospective buyers, solicitation of offers to purchase, conduct of an auction, and ultimate selection of the highest or best offer to purchase the assets. After the court approves the bid procedures, the debtor and interested parties follow the court-approved process to obtain the highest or best offer for the assets. Once such an offer is selected, the debtor, proposed purchaser, and other parties in interest will return to the court for a "sale hearing," wherein the debtor will ask the court to approve a sale of the assets to the winning bidder. But what happens when a third party attempts to derail the sale at the sale hearing by purporting to offer at the sale hearing consideration beyond that proposed by the winning bidder at the auction? Such a "sale-hearing spoiler" could be a party that did not participate in the auction process in accordance with the bid procedures or could be a remorseful losing bidder that seeks to increase its bid at the sale hearing despite the auction process being closed pursuant to the court-approved bid procedures.

How do courts treat such sale-hearing spoilers? Courts balance two competing interests. The first interest is integrity of the bankruptcy-sale process: courts approve bid procedures and enforce those procedures to give prospective bidders confidence that, upon offering the highest bid, a sale to the prospective purchaser will be approved by the court. Prospective purchasers in the 363-sale process would be less likely to participate in the process if the purchasers have no confidence that the rules of the game will be enforced. The second interest is for the good of the bankruptcy estate: the purpose of a 363 sale is to obtain the highest price for estate assets. Creditors of the specific bankruptcy estate no doubt want the court to allow the new arrival (or regretful second-place bidder) to provide a higher recovery to the bankruptcy estate.

Unfortunately for successful auction bidders, offering the highest bid at an auction may not provide the finality bidders desire. The finality of a "closed" auction rests largely on the relief sought by the debtor in the bid-procedures motion and the expectation of finality by the participants.

B. Bankruptcy Court Guidelines

The Bankruptcy Court for the Southern District of New York has established guidelines to be followed by debtors seeking to institute a 363 sale process. General Order M-383, entitled *In re Adoption of Amended Guidelines for the Conduct of Asset Sales*, provides valuable guidance on how bid procedures should be applied. As to a sale-hearing spoiler, the Southern District of New York appears to place value on the auction process having a degree of finality. The guidelines provide: "The Sale Procedures Order should provide that, absent irregularities in the conduct of the auction, or reasonable and material confusion during the bidding, the Court will not consider bids made after the auction has been closed, or the [bid procedures] motion should explain why this is not advisable."[20] The Bankruptcy Court for the Northern District of Texas has not issued similar guidelines in the context of a 363 sale that occurs in a mature bankruptcy case. The Northern District of Texas has, however, issued guidelines related to a 363 sale that occurs within the first sixty days of a bankruptcy case. The Northern District of Texas has issued the *Guidelines for Early Disposition of Assets In Chapter 11 Cases; The Sale of Substantially All Assets Under Section 363 and Overbid and Topping Fees* (the "N.D. Tex. Guidelines"). The N.D. Tex. Guidelines provide, among other things, that "Unless the court orders otherwise, competing bids may be presented at the time of the hearing. The motion [to sell] and the notice of hearing should so provide."[21]

C. Corporate Assets, Inc. v. Paloian: Bidding Reopened

Districts that do not have such guidelines, but have nonetheless addressed the issue of the sale-hearing spoiler include the District of Minnesota and the Northern District of Illinois. In the bankruptcy case of Goss Holdings, Inc. and Goss Graphic Systems, Inc., the Northern District of Illinois was presented with the issue of whether to reopen an auction to permit a losing bidder to increase its offer.[22] In *Corporate Assets, Inc. v. Paloian*, the Seventh Circuit Court of Appeals affirmed the Northern District of Illinois Bankruptcy Court's decision to reopen bidding to allow a losing bidder to tender a higher bid after the close of the auction. The bid procedures previously approved by the bankruptcy court provided:

> [The Debtor] may (a) determine, with the agreement of representatives of the [pre- and post-petition] Lenders and the Committee [of unsecured creditors], which Qualified Bid(s), if any, is the highest or otherwise best offer; and (b) reject at any time before entry of an order of the Bankruptcy Court approving a Qualified Bid, any bid that is (i) inadequate or insufficient, (ii) not in conformity with the requirements of the Bankruptcy Code, the bidding procedures, or the terms and conditions of sale, or (iii) contrary to the best interests of Goss, its estate[], and its creditors. At or before the Sale Hearing, [the Debtor] may impose such other terms and conditions as it may determine to be in the best interests of [the Debtor's] estate, its creditors and other parties in interest.[23]

The court noted the two competing interests of an auction process: integrity of the process and maximizing value for the estate.[24] "A tension arises between these two interests where, as here, someone

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[20] General Order M-383, I.B.5(e).

[21] N.D. Tex. Guidelines, p. 3; *see also* N.D. Cal. & E.D. Tex. (having similar guidelines). *But see* D. Or. LBF 363, *Guidelines Regarding Motions for Sale of All or Substantially All Assets and Sale Procedures Motions* (providing guidelines for 363 motions, but not addressing bid submission at sale hearing); D.N.J., *In re Chapter 11 Guidelines for Sale of Estate Property* (same).

[22] *Corporate Assets, Inc. v. Paloian*, 368 F.3d 761 (7th Cir. 2004).

[23] *Id.* at 763-64.

[24] *Id.* at 767-68.

> As the lower courts recognized, two principal interests come to the fore when a bankruptcy court is asked to confirm the results of a judicial sale. "The governing principle at a confirmation proceeding is the securing of

makes a higher, upset bid after the auction has concluded and bidding has formally closed. Accepting a late bid may mean more money for creditors in the short run, but by upsetting the expectations of those who thought the bidding was at an end, it may in the long term undermine confidence in judicial sales and discourage prospective purchasers from making their best offers in a timely manner."[25] **In *Paloian*, the court found the determinative factor to be the parties' expectation of finality of the auction.** "Once a court has confirmed the sale of the debtor's assets to the auction's victor, for example, the public interest in finality is high and the parties reasonably expect that the bidding is over."[26] However, where the sale has not yet been approved by the court (i.e., no sale order entered), the court "might appropriately conclude that consideration of a late bid would not unduly frustrate the reasonable expectations of the participants or compromise the integrity of the process."[27] The *Paloian* Court read the bid procedures quoted above as giving the debtor broad discretion to accept an alternate bid or impose additional requirements at any time prior to the sale hearing.

> Although the first auction had come to a close and none of the parties had expected bidding to resume, [the winning bidder's] high bid had not been formally accepted, and [the debtor] was still empowered to reject that bid and/or to burden it with additional conditions until such time as the court approved the sale to [the winning bidder]. [The winning bidder's] expectation that it had won the right to purchase the . . . assets was therefore not without qualification. On these facts, the bankruptcy court was entitled to conclude that [the winning bidder's] expectations as the high bidder, and the public interest in the finality of the sale proceedings, were not so solidified as to preclude a second auction.[28]

Thus, according to *Paloian*, the bidders' expectation of "finality" of the auction greatly impacts the probability of a sale-hearing spoiler. The *Paloian* Court appears to hold that a sale-hearing spoiler will not be permitted to submit a tardy bid if the winning bidder's "expectations as the high bidder . . . [are] so solidified as to preclude a second auction." To preserve the ability to accept a additional bids any time up entry of the sale order, debtors should include in the bid procedures a mechanism that affords the debtors enough discretion to alter the bidding procedures or impose additional conditions such that the parties' expectation of finality is lessened. Stalking-horse bidders, on the other hand, should require that bid procedures instill a clear expectation that the winning bid at the auction will be presented to the Court for approval, regardless of subsequent events.

D. In re Polaroid Corporation: Bidding Reopened (Again)

Similar to *Paloian* (and more recently), the Bankruptcy Court for the District of Minnesota was asked to reopen an auction in the case of *In re Polaroid Corporation*.[29] In *Polaroid*, the winning bidder ("Patriarch") at an auction provided a purchase offer comprised of cash plus equity in the reorganized debtor; the losing bidder ("Hilco/Gordon") provided a purchase offer comprised of less cash plus a greater percent of equity in the reorganized debtor. After the auction, the debtors filed a status report declaring Patriarch as the winning bidder. Soon thereafter, the debtors requested a closed conference with the Judge (the bidders were not present). After the conference, the debtors requested permission to

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> the highest price for the bankruptcy estate." *In re Chung King, Inc.*, 753 F.2d 547, 549 (7th Cir. 1985). A central purpose of bankruptcy, after all, is to maximize creditor recovery. *E.g., Precision Indus., Inc. v. Qualitech Steel SBQ, LLC*, 327 F.3d 537, 548 (7th Cir.2003). But there is also an interest in the finality and integrity of the process by which bids are accepted and approved. "'If parties are to be encouraged to bid at judicial sales[,] there must be stability in such sales and a time must come when a fair bid is accepted and the proceedings are ended.'" *Chung King*, 753 F.2d at 550 (quoting *In re Webcor, Inc.*, 392 F.2d 893, 899 (7th Cir.1968)); *see also Shlensky v. H.R. Weissberg Corp.*, 410 F.2d 1182, 1185-86 (7th Cir.1969).

[25] *Id.* at 768.
[26] *Id*.
[27] *Id*.
[28] *Id*. at 772.
[29] Bankr. D. Minn., Case No. 08-46617.

reopen the auction, make use of a sealed final bid procedure, and establish a cap on the portion of the bids that may be comprised of equity. Over the objection of Patriarch, the Court allowed the auction to be reopened, and established sealed auction procedures.[30] After the auction was reopened and sealed offers presented, the debtors selected Hilco/Gordon as having the highest or best offer (comprised of cash plus equity). Just prior to the continued sale hearing, Patriarch objected to the sale to Hilco/Gordon and submitted its own revised bid. At the sale hearing, the debtors supported Patriarch's bid as the highest or best offer for the assets. At the sale hearing, the court ruled that it had the discretionary power to (again) reopen the auction, and scheduled a final open auction to occur in the courtroom with the Judge presiding as an observer. Immediately after the conclusion of the final open auction, the debtors selected Patriarch as the winning bidder. The creditors objected and argued that Hilco/Gordon provided the higher or better offer. After a contested evidentiary hearing, Hilco/Gordon was determined by the court to have submitted the superior offer. Patriarch moved for stay pending appeal, which the court denied. One week later, the district court also declined to grant a stay pending appeal.

Noting the tension between finality and estate recovery, the court found that the debtor "reserve[d] as much latitude as possible in the proffer of these assets for sale . . . so expectations again for bidders coming in weren't necessarily fixed in stone. Everybody had to be prepared to be flexible."[31] The court found estate recovery to be more important than integrity of the process. Specifically, the court held "I am going to put a premises on the maximizing of realization over the more abstract goal and definitely subordinated goal of 'integrity in the process' and parties' reliance."[32] The determinative factor, therefore, appeared to be the bidders' expectation of finality. The court relied heavily on the Eighth Circuit Court of Appeals case *Food Barn Stores, Inc*., which provides additional guidance on when courts will allow a sale-hearing spoiler.

In *Food Barn*, the Court of Appeals considered whether the bankruptcy court committed error by allowing a higher bid to be proposed by a competing bidder after the bankruptcy court had orally accepted another bidder's lower bid as the winning bid.[33] The *Food Barn* Court noted that the First Circuit Court of Appeals had previously addressed a similar issue and, "[b]y implicitly utilizing bidders' reasonable expectations as a guidepost in reviewing the propriety of a bankruptcy court's actions, the First Circuit charted what we feel is a logical path in balancing the need for finality against the interest in maximizing the estate's worth."[34] The *Food Barn* Court held:

> At some point, such as when the court actually enders an order approving the sale, expectations become sufficiently crystallized so as to render it improper to frustrate anticipated results except in the limited circumstances where there is a grossly inadequate price or fraud in the conduct of the proceedings.[35]

According to the Eighth Circuit Court of Appeals, the bid procedures and bidders' expectations determine whether a sale-hearing spoiler will be successful: **"To summarize, we think that the important notions of finality and regularity in judicial auctions are appeased if the court acts consistently with the rules by which the particular sale is conducted [i.e., the bid procedures] and in compliance with the bidders' reasonable expectations."**[36] Therefore, if the bid procedures are structured such that the bidders' "reasonable expectations" are that a sale-hearing spoiler will not be permitted, the likelihood of the court permitting such a spoiler will be lessened.

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[30] At issue at the original auction and the closed conference was how to value the equity in the reorganized debtor. Hilco/Gordon refused to provide an explanation of how such equity should be valued because it would require disclosure of confidential proprietary information on how the reorganized debtor would be operated.
[31] In re Polaroid Corporation, Case No. 08-46617, April 9, 2009, Transcript, Docket No. 359, p. 122.
[32] In re Polaroid Corporation, Case No. 08-46617, April 9, 2009, Transcript, Docket No. 359, p. 136.
[33] *Four B. Corporation v. Food Barn Stores, Inc. (In re Food Barn Stores, Inc.)*, 107 F.3d 558 (8th Cir. 1997).
[34] *Id*. at 565 (citing *In re Gil-Bern Indus.*, 526 F.2d 627 (1st Cir. 1975)).
[35] *Id*.
[36] *Id*.

As can be seen from the cases discussed herein, total prevention of the sale hearing spoiler may not be possible. However, by establishing strict bid procedures such that all parties have a reasonable expectation of finality in the auction process, the risk of a sale hearing spoiler successfully derailing the auction process is mitigated. Debtors and creditors alike will favor bid procedures that leave discretion with the debtors such that expectations of finality are lessened. Stalking horse bidders, on the other hand, will favor bid procedures that set expectations of finality "in stone." Absent clear expectations of finality, sale-hearing spoilers will remain a possibility. However, if bid procedures are structured such that expectations of finality are clear and definite, the risk of a sale-hearing spoiler may be mitigated to only those bidders proposing such an increase in the purchase price that the court must look beyond the bidders' reasonable expectations of finality.

IV. SUCCESSOR LIABILITY ISSUES

In the context of corporate law principles, the general rule is that there is no successor liability imposed upon a purchaser of corporate assets unless the purchaser expressly agrees to assume liability. This flows from the principle that liabilities attach to the corporate entity itself and not to the corporate assets. Purchasers are thus more willing to make a larger offer for the corporate assets because bids do not have to be discounted upon the potential liabilities.

Successor liability is an exception to the general rule that the transfer of assets does not pass on the liabilities of the seller to the purchaser, similar to other exceptions where there is (1) an express or implied assumption of liabilities, (2) a consolidation or merger, (3) a "mere continuation" of the seller, and/or (4) a fraudulent transfer to avoid the claims of creditors.[37] Successor liability is based not on new or independent causes of action but on the transfer of the seller's liability arising from the assets sold to the purchaser. This issue becomes subject to more debate in bankruptcy because of the competing rationales of maximizing the value of the estate by extinguishing successor liability claims versus the deprivation of due process of successor liability claimants. Further, since a claim under the theory of successor liability is not a new claim, one must examine whether the claimant has a "claim" dischargeable in bankruptcy and/or extinguishable by a Section 363 sale.[38]

A. General Overview

Two provisions of 11 U.S.C. § 363 are relevant to sales free and clear of successor liability: Subsections 363(b) and (f). Section 363(b) provides that "the trustee, after notice and a hearing, may use, sell, or lease, other than in the ordinary course of business, property of the estate."[39] The real advantage to a debtor from a Section 363 sale, however, comes not from Section 363(b) but from Section 363(f). Pursuant to Section 363(f), a debtor in possession may sell property "free and clear of any interest in such property" if at least one of the following conditions are met:

(1) applicable nonbankruptcy law permits sale of such property free and clear of such interest;
(2) such entity consents;
(3) such interest is a lien and the price at which such property is to be sold is greater than the aggregate value of all liens on such property;
(4) such interest is in bona fide dispute; or
(5) such entity could be compelled, in a legal or equitable proceeding, to accept a money satisfaction of such interest.[40]

[37] *Fairchild Aircraft Inc. v. Cambell (In re Fairchild Aircraft Corp.*), 184 B.R. 910, 920 (Bankr. W.D. Tex. 1995); *vacated*, 220 B.R. 909 (Bankr. W.D.Tex. 1998).
[38] *Id.* at 920, 921, n. 11.
[39] 11 U.S.C. § 363(b).
[40] 11 U.S.C. § 363(f).

The dispute over whether successor liabilities can be eliminated by Section 363(f) hinges upon the meaning of the word "interest" in Section 363(f)(1). Future claims against the debtor may or may not have a present interest against the estate depending upon the definition of "interest." The *GM* court[41] recently noted that there is no plain meaning of the word interest. Because of the lack of a plain meaning, courts have looked to case law for interpretations of "interest" as used in Section 363(f) and a circuit split has resulted based upon two different readings of the statute. One line of cases supports a narrow reading of the word "interest" in Section 363(f) as compared to its use in Section 1141(c). Section 363(f) is construed more narrowly because it only provides for sales free and clear of interests in such property, whereby Section 1141(c) provides for sales free and clear of "claims and interests."[42] Thus, this line of cases reason, Congress did not intend to include claims within the ambit of Section 363(f) because the word was explicitly left out. Further, because Section 363(f) only permits sales free and clear of interests, Congress intended it to be limited to *in rem* interests (such as liens and other security interests) and not unsecured *in personam* interests (such as successor liability).

Courts that hold to this narrow reading of Section 363(f) thus rationalize that assets sold pursuant to this Section are not sold free and clear of successor liability.[43] The First Circuit decided to reserve judgment on successor liability in *In re Savage Indus., Inc*.[44] when it noted the issue but "express[ed] no view as to whether Bankruptcy Code § 363(f) enables the extinguishment of state-law based successor 'product-line' liability claims." The court did note, however, that the argument is based in part upon due process. The Sixth and Seventh Circuits expressed their view of Section 363(f) and have held that successor liability claims are not interests under the section and thus cannot be sold free and clear in a purchase agreement.[45] An oft-cited case for this view is *In re Fairchild Aircraft Corp.*, cited above, that continues to hold weight although later vacated by the same court. The chapter 11 trustee in *Fairchild* formulated and filed a liquidating plan funded by the sale of the debtor's assets to the purchaser for $5 million, plus the assumption of certain secured debt. The plan envisioned a Section 363 sale of the debtor's assets free and clear of all liens, claims and interests, and the purchaser was not responsible for any liabilities or debts of the debtor. Nearly three years later, after an aircraft manufactured by the debtor crashed and killed four people, several plaintiffs brought a wrongful death action against the purchaser under the theory of successor liability. The court noted that perhaps bankruptcy courts *should* have the power to sell free and clear of "trailing liability" for future claims, but that a policy decision of this nature must be made by Congress, not the courts.[46] Thus, while *in rem* interests are extinguished, *in personam* interests such as successor liability are not.

The broader reading of Section 363(f), which reflects a growing majority approach, allows bankruptcy courts to extinguish successor liability claims via Section 363(f). The Third Circuit in *In re Trans World Airlines, Inc.*, 322 F.3d 283 (3rd Cir. 1996), authorized a Section 363 sale free and clear of pending

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[41] Discussed *infra*.
[42] 11 U.S.C. § 1141(c).
[43] *See, e.g., In re White Motor Credit Corp*., 75 B.R. 944, 949 (Bankr. N.D. Ohio 1987) ('General unsecured claimants including tort claimants, have no specific interest in a debtor's property. Therefore, Section 363 is inapplicable for sales free and clear of such claims."); *In re Wolverine Radio Co*., 930 F.2d 1132, 1147, n. 23 (6th Cir. 1991); *Zerand-Bernal Inc. v. Cox*, 23 F.3d 159, 163 (7th Cir. 1994) ("It is true that Cary's assets were sold to Zerand free from all liens and other encumbrances. And such a cleansing of the assets in the bankruptcy sale is a valid power of a bankruptcy court, 11 U.S.C. §§ 363(f), 1141(c). But the Coxes are not attempting to enforce a lien."); *Fairchild Aircraft, Inc.*, 184 B.R. at 917-18 ("Section 363(f) does not authorize sales free and clear of *any interest*, but rather of *any interest in such property*. These three additional words define the real breadth of *any interests*. The sorts of interests impacted by a sale 'free and clear' are *in rem* interests which have attached to the property. Section 363(f) is not intended to extinguish *in personam* liabilities. Were we to allow "any interests" to sweep up *in personam* claims as well, we would render the words "in such property" a nullity. No one can seriously argue that *in personam* claims have, of themselves, an *interest in such property*.") (emphasis in original); *Kattula v. Republic Bank (In re LWD, Inc.)*, 2009 WL 367738 at *4 (W.D. Ky. 2009) ("However, the Sixth Circuit has noted that not all interests falls within the scope of § 363(f).")
[44] *In re Savage Indus., Inc*., 43 F.3d 714, 723 (1st Cir. 1994).
[45] *See In re Wolverine Radio Co*., 930 F.2d 1132, 1147, n. 23 (6th Cir. 1991); *see also Zerand-Bernal Inc. v. Cox*, 23 F.3d 159, 163 (7th Cir. 1994).
[46] *In re Fairchild Aircraft Corp., supra* note 1, at 918-19.

employment discrimination claims against the airline. The *TWA* court sought to maximize the value of the estate property and further to adhere to the priority scheme of the Bankruptcy Code, its two primary justifications for using a broad reading of Section 363(f). By extinguishing successor liability claims, the sale price of the debtor's assets is increased and it further prevents a larger recovery from the successor than the unsecured claim would otherwise receive in the debtor's plan of reorganization.

B. Limiting or Cutting Off Rights of Future Creditors

The narrow and broad readings of Section 363(f) center more often upon successor liability generally, and often do not focus upon future claimants as opposed to existing claimants. Courts that adopt a narrow reading are concerned that due process is not offered to future tort claimants because such future claims do not exist as of the date that asset sale closes. The *TWA* court, however, interpreted "interests in property" as claims that are connected to or arise from the assets being sold, which would include future claimants. Moreover, Section 101(5) defines "claim" very broadly, and future claims may fit in under the definition if it gives rise to "a right to payment." Thus, a new nuance is added when considering eliminating successor liability for future, and as yet unknown, claimants. The *GM* and *Chrysler* bankruptcy courts were confronted with how to handle future claimants in connection with a Section 363 sale.

C. Case Study of GM/Chrysler – Lessons Learned Concerning Future Claims

Because of the nature of the automobile manufacturing industry, it is unsurprising that the recent Section 363 sales in *GM* and *Chrysler* brought to the forefront the treatment of future claims when large product liability lawsuits abound. The auto companies argued that "free and clear" asset sales extinguish future successor liability claims while tort claimants argued that the bankruptcy court did not have the power to extinguish successor claims. However, successor liability and future tort claimant issues were only briefly addressed by the *Chrysler* court. The *Chrysle*r court, relying on *TWA*, summarily overruled the future tort claimants objections to the sale. The *Chrysler* court went on to note that "*in personam* claims, including any potential state successor or transferee liability claims against New Chrysler, as well as *in rem* interests, are encompassed by Section 363(f) and are therefore extinguished by the Sale Transaction."[47] The *GM* court used the *Chrysler* decision as its primary justification for rejecting successor liability. The *GM* court noted that "Judge Gonzalez expressly considered and rejected the efforts to impose successor liability. . . [and this] Court has previously noted how *Chrysler* is so closely on point, and this issue is not an exception."[48] The *GM* court further stated that the Second Circuit affirmed the holding of the *Chrysler* court and must have agreed that "363(f) may appropriately be invoked to sell free and clear of successor liability claims."[49] Successor liability was argued at length before the Circuit Court concerning both present claims and unknown future claims. Because *Chrysler* is not distinguishable from *GM*, the *GM* court held that "it is not just that the Court feels that it *should* follow *Chrysler*. It *must* follow *Chrysler*."[50]

The GM court acknowledged that there was a significant circuit split on successor liability within Section 363 sales, but ultimately concluded that it had to follow the Second Circuit under *stare decisis*. Besides its stated lack of choice in the matter, the *GM* court also found the comparison between Sections 1141(c) and 363(f) to be faulty, because "interests" used in Section 1141(c) "is used with a wholly different definition" as used to define interests in property in Section 363(f). Nevertheless, the *GM* court left the issue unresolved because "textual analysis is inconclusive."[51]

Thus, both the *GM* and *Chrysler* cases held that successor liability was extinguished by the Section 363

[47] *In re Chrysler, LLC*, 405 B.R. 84, 111 (Bankr. S.D.N.Y. 2009).
[48] *In re General Motors Corp.*, 407 B.R. 463, 504 (Bankr. S.D.N.Y. 2009).
[49] *Id.* at 505.
[50] *Id.* (emphasis in original).
[51] *Id.* at 503.

sale and the decisions appeared to cement the end of successor liability in the Second Circuit. The courts did acknowledge the majority of circuits that supported such a view. However, it remains unresolved whether successor liability, and especially future claims, should be extinguished simply because the sale is free and clear of all interests. Although the Second Circuit affirmed "the bankruptcy court's decision insofar as it constituted a valid exercise of authority under the Bankruptcy Code," it declined to "delineate the scope of the bankruptcy court's authority to extinguish future claims, until such time as we are presented with an actual claim for an injury that is caused by Old Chrysler, that occurs after the Sale, and that is cognizable under state successor liability law."[52] Still, potential future tort claimant litigants objecting to sales free and clear of successor liability outside of the Second Circuit will have to acknowledge the *GM* and *Chrysler* decisions as recent authority for such a proposition, but should then cite decisions that hold that successor liability remains after the sale. As of the date of this paper, no case outside of the Second Circuit has cited to the *GM* case, so there is little analysis in the wake of the *GM/Chrysler* decisions. The strongest argument for future tort claimants appears to be the deprivation of due process concerning the loss of property and the lack of notice of and a hearing on a Section 363 sale free and clear of their interest.

[52] *State Police Pension Trust v. Chrysler LLC (In re Chrysler LLC)*, 576 F.3d 108, 127 (2nd Cir. 2009), *vacated as moot*, 130 S. Ct. 1015, 175 L. Ed. 2d 614 (2009).

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- In re Hazel Pointe, LP et al. – Chapter 11 Trustee
- In re Wildflower Resort Company – Chapter 11 Trustee
- In re Senior Management Services of America, Inc. et al. – Debtors and post-confirmation trust
- In re Global DocuGraphix, Inc. et al. – Debtors
- In re FFP Operating Partners, LP – Official Committee of Unsecured Creditors
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- Speaker, Distressed Companies: Warning Signs and Beyond, Continuing Professional Education Seminar, Accretive Solutions (Mar. 17, 2009).
- Co-Author, Committee Solicitation of Representation Under BAPCPA: A Look at Rules Governing Solicitation of Representation of Creditor Committees and a look at How Debtors, Committees, and Courts Have Dealt with the Additional Duties Imposed Upon Committee by 11 U.S.C. § 1102(b)(3), 25th Anniversary Jay L. Westbrook Conference, University of Texas School of Law, Austin, Texas (Nov. 15 - 17, 2006).
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